January 2003

MJI Publications Updates

Child Protective Proceedings Benchbook

Domestic Violence Benchbook (2d ed)

Juvenile Justice Benchbook

Sexual Assault Benchbook

Traffic Benchbook--Revised Edition, Volume 2

January 2003

Update: Child Protective Proceedings Benchbook

CHAPTER 5

Time & Notice Requirements

Insert new Section 5.18 at the end of Chapter 5.

5.18 Special Provisions for Incarcerated Parties

In addition to the procedures for notification of noncustodial parents,* special procedures must be followed when one of the parties to a child protective proceeding is incarcerated. Effective January 1, 2003, MCR 2.004 requires specific actions be undertaken in cases involving incarcerated parties.

*See Section 5.8 (Special Notice Provisions for Noncustodial Parents).

A. Applicability

MCR 2.004 applies to:

> "(1) domestic relations actions involving minor children, and
>
> "(2) other actions involving the custody, guardianship, neglect, or foster-care placement of minor children, or the termination of parental rights,
>
> in which a party is incarcerated under the jurisdiction of the Department of Corrections." MCR 2.004(A)(1)–(2).

B. Responsibility of the Party Seeking an Order

Under MCR 2.004(B), a party seeking an order regarding a minor child must do the following:

> "(1) contact the department to confirm the incarceration and the incarcerated party's prison number and location;

> "(2) serve the incarcerated person with the petition or motion seeking an order regarding the minor child, and file proof with the court that the papers were served; and
>
> "(3) file with the court the petition or motion seeking an order regarding the minor child, stating that a party is incarcerated and providing the party's prison number and location; the caption of the petition or motion shall state that a telephonic hearing is required by this rule." MCR 2.004(B)(1)–(3).

C. Responsibility of the Court

Once a party has completed the foregoing requirements to the court's satisfaction, MCR 2.004(C) requires the court to:

> "issue an order requesting the department, or the facility where the party is located if it is not a department facility, to allow that party to participate with the court or its designee by way of a noncollect and unmonitored telephone call in a hearing or conference, including a friend of the court adjudicative hearing or meeting. The order shall include the date and time for the hearing, and the prisoner's name and prison identification number, and shall be served by the court upon the parties and the warden or supervisor of the facility where the incarcerated party resides."

The purpose of this telephone call is to determine the following:

> "(1) whether the incarcerated party has received adequate notice of the proceedings and has had an opportunity to respond and to participate,
>
> "(2) whether counsel is necessary in matters allowing for the appointment of counsel to assure that the incarcerated party's access to the court is protected,
>
> "(3) whether the incarcerated party is capable of self-representation, if that is the party's choice,
>
> "(4) how the incarcerated party can communicate with the court or the friend of the court during the pendency of the action, and whether the party needs special assistance for such communication, including participation in additional telephone calls, and
>
> "(5) the scheduling and nature of future proceedings, to the extent practicable, and the manner in which the

incarcerated party may participate." MCR 2.004(E)(1)–(5).

D. Documentation and Correspondence to Incarcerated Party

MCR 2.004(D) requires all court documents or correspondence mailed to the incarcerated party to include the name and prison number of the incarcerated party on the envelope.

E. Denial of Relief and Sanctions

MCR 2.004(F)-(G) provide:

> "(F) A court may not grant the relief requested by the moving party concerning the minor child if the incarcerated party has not been offered the opportunity to participate in the proceedings, as described in this rule. This provision shall not apply if the incarcerated party actually does participate in a telephone call, or if the court determines that immediate action is necessary on a temporary basis to protect the minor child."
>
> "(G) The court may impose sanctions if it finds that an attempt was made to keep information about the case from an incarcerated party in order to deny that party access to the courts."

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Update: Domestic Violence Benchbook (2d ed)

CHAPTER 11

Support

11.7 Effect of Divorce Judgment on Subsequent Tort Remedies for Domestic Violence

A. Res Judicata and Collateral Estoppel

Insert the following language on the bottom of page 411:

> For a case holding that the collateral estoppel doctrine does not bar a plaintiff in a subsequent federal civil suit from relitigating the issue of probable cause as determined at the plaintiff's preliminary examination in state court, see *Hinchman v Moore*, ___ F3d ___ (CA 6, 2002) (reversing the district court's granting of defendant's motion for summary judgment precluding plaintiff from relitigating the issue of probable cause in her civil suit for malicious prosecution, false arrest, and false imprisonment, where the claim was based on a police officer's providing false information to support the probable cause determination).
>
> For a detailed discussion of the doctrines of collateral estoppel and mutuality of estoppel, and the interplay between them, see *Keywell v Bithell*, ___ Mich App ___ (2002).

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Update: Juvenile Justice Benchbook

CHAPTER 24

"Traditional" Waiver of Family Division Jurisdiction

24.20 Procedures by Court When Waiver Is Ordered

Insert the following text on the bottom of page 24-9:

> In *Spytma v Howes,* __ F3d ___ (CA 6, 2002), the United States Court of Appeals for the Sixth Circuit determined whether due process requires a judge to make specific findings on the record regarding all of the criteria for waiving jurisdiction over a juvenile. Spytma was fifteen years old in 1974 when he was charged with first-degree murder. In waiving jurisdiction over Spytma, the lower court made specific findings regarding some but not all of the applicable waiver criteria. The federal Court of Appeals stated:
>
> > "[O]ur concern today is whether petitioner received due process as required by *Kent* [*v United States*, 383 US 541 (1966)], not whether the state court meticulously complied with Juvenile Rule 11.1. We find that minimum due process requirements were met. Petitioner was represented by counsel and a hearing was held on the record. Whether the Michigan court's waiver of jurisdiction and transfer to adult court contain sufficient indicia under state law is a question for the Michigan courts, which have held that it was valid. Accordingly, despite the lack of specific findings on the record concerning the listed criteria, we cannot say that the judge did not consider all the criteria before making his decision or that the hearing did not comport with minimum due process." *Spytma, supra* at ___.

The Court also indicated that despite the lack of a reviewable record, any error was harmless because any "reasonable" probate judge would have transferred the juvenile to adult court.

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CHAPTER 3

Other Related Offenses

3.22 Malicious Use of Phone Service

Insert the following language at the end of the Note at the top of p 174, before subsection (A):

> Additionally, the Court of Appeals has ruled unconstitutional (as applied to defendant) a local ordinance prohibiting persons from using "abusive or obscene" language "when such words by their very utterance inflict injury or tend to incite an immediate breach of the peace." In *People v Pouillon*, ___ Mich App ___ (2002), the defendant entered a conditional plea of no contest to this ordinance for yelling "[t]hey kill babies in that church . . . [w]hy are you going in there?" to mothers who were dropping off their children at a day-care/pre-school operated by that church. Defendant's statements caused the children to be "visibly frightened and upset." He yelled these words while standing on city property, 30 feet away from a dentist's office and 300 feet away from the church. He chose that location because the church and the dentist had either previously celebrated the anniversary for Planned Parenthood or had publicly supported the organization. The Court of Appeals, in reversing defendant's conviction, and in finding that defendant's statements were not "fighting words," a category of words excluded from First Amendment protection, explained its rationale as follows:
>
> > "In this case, defendant's words had no tendency to incite an imminent breach of the peace. Defendant's message was in the form of grotesque exaggeration that was more likely to frighten children than to impart information. However, the children's mere fright, though an unfortunate consequence of defendant's speech, did not rise to the level

of violence or a disturbance of public order nor was such a result likely. If the purpose of the prohibition on 'fighting words' is to preserve public safety and order, then unprotected 'fighting words' do not encompass words that would emotionally upset children who are unlikely to retaliate. Therefore, based on the limited facts of this case, we find that the ordinance was unconstitutionally applied to defendant." *Id*. at ___.

CHAPTER 7

General Evidence

7.14 Privileges Arising From a Marital Relationship

C. Retroactivity of Amendment to Spousal and Marital Communication Privileges

Insert the following language at the end of the first full paragraph on p 391:

> For a recent federal case on Ex Post Facto Clause analysis, see *United States v Ristovski*, ___ F3d ___ (CA 6, 2002) (holding that an amendment to a Federal Rule of Criminal Procedure, which decreased the time in which defendants can file motions for new trials on the basis of newly discovered evidence, is procedural in nature and may be applied retroactively without violating the Ex Post Facto Clause).

CHAPTER 10

Other Remedies for Victims of Sexual Assault

10.6 Concurrent Criminal and Civil Proceedings

B. The Victim's Use of Judgments or Orders From Criminal or Juvenile Proceedings as Evidence in Civil Actions

Insert the following language at the end of the "Collateral Estoppel" discussion on p 505:

> For a case holding that the collateral estoppel doctrine does not bar a plaintiff in a subsequent federal civil suit from relitigating the issue of probable cause as determined at the plaintiff's preliminary examination in state court, see *Hinchman v Moore*, ___ F3d ___ (CA 6, 2002) (reversing the district court's granting of defendant's motion for summary judgment precluding plaintiff from relitigating the issue of probable cause in her civil suit for malicious prosecution, false arrest, and false imprisonment, where the claim was based on a police officer's providing false information to support the probable cause determination).
>
> For a detailed discussion of the doctrines of collateral estoppel and mutuality of estoppel, and the interplay between them, see *Keywell v Bithell*, ___ Mich App ___ (2002).

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Update: Traffic Benchbook – Revised Edition, Volume 2

CHAPTER 2

Procedures in Drunk Driving and DWLS Cases

2.6 Arraignment/Pretrial Procedures

E. Guilty and Nolo Contendere Pleas

3. Collateral Attack of Guilty Plea to Prior Offense

Insert the following language at the end of Section 2.6(E)(3), after the first partial paragraph near the top of page 2-38:

> The six-month time limit established in the amendments to MCR 6.610(E)(7) and MCR 7.103(B) for bringing motions to withdraw pleas in district court and for appealing denials of such motions may be applied retroactively. In *People v Clement*, ___ Mich App ___ (2002), the defendant was charged with OUIL/UBAL-3d. After being bound over on the charge, the defendant moved, on the basis of deprivation of counsel, to set aside a prior plea-based conviction for impaired driving entered in 1995. The district court granted that motion, and defendant thereafter brought a motion in circuit court to quash the OUIL/UBAL-3d charge. The circuit court denied the motion, finding that the district court's order setting aside the 1995 conviction was invalid since defendant waited too long after being sentenced to file his motion. On appeal, defendant argued that the six-month deadline for challenging guilty pleas in district court should not apply to his case because the amendments to MCR 6.610(E)(7)(a) and MCR 7.103(B)(6), which established the six-month time limit, did not take effect until September 1, 2000, approximately five years after the date of the prior conviction. The Court of Appeals affirmed the circuit court's denial of defendant's motion to quash, holding that defendant's collateral attack was time-barred under the rules. In so holding, the Court relied on the rules' staff comments, which unambiguously state that the six-month time limit for judgments

entered before the effective date of the amendment (September 1, 2000) is to commence on the amendment's effective date. The Court explained its rationale as follows:

> "The amendments to MCR 6.610(E)(7)(a) and MCR 7.103(B)(6) make clear the Supreme Court's intention to foreclose unequivocably appeals of district court guilty pleas brought over six months after entry of the judgment. Moreover, the interplay of [*People v Ward*, 459 Mich 602 (1999)], MCR 6.610(E)(7)(a), and MCR 7.103(B)(6) convinces us that the staff comment[s] to the [foregoing court rules] are entirely correct: A defendant who pleaded guilty to an offense in district court before the effective date of the amendments had only six months from September 1, 2000, to challenge the plea. Any other interpretation would contravene the *Ward* Court's strong disavowal of delayed challenges to guilty pleas and the Court's corresponding intent to limit the time period for challenging a plea-based conviction. Defendant missed the six-month deadline in the instant case, and therefore the district court erroneously allowed defendant to withdraw his guilty plea in the 1995 case." *Id*. at ___.

Apart from its reliance on the foregoing court rules, the Court of Appeals also rested its opinion on the explicit holding of *Ward*, *supra*, which foreclosed collateral attacks on prior convictions when made on the basis of subsequent sentencing considerations:

> "The instant case presents analagous facts to those at issue in *Ward*. Indeed, defendant waited over five years to challenge his guilty plea, and he did so only after being charged with OUIL 3d. Therefore, a challenge by the prosecutor to the district court's order of dismissal in defendant's 1995 case would have been meritorious under *Ward*, even disregarding the amendments to [the foregoing court rules]." *Id*. at ___ n 2.

Finally, the Court rejected defendant's ex post facto argument, finding it so cursory that it did not even have to address it. However, the Court stated that, if it were to address the issue, it would find no constitutional violation since the court rule amendments were procedural and "did not criminalize a theretofore innocent act, did not aggravate a crime previously committed, did not provide greater punishment for a crime, and did not change the proof necessary for a conviction." *Id*. at ___.